FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 11, 2011

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. PENN 2009-775 A.C. No. 36-02945-194224
v.	:	Docket No. PENN 2009-825 A.C. No. 36-02945-197364
SHAMOKIN FILLER COMPANY INC., Respondent	:	Docket No. PENN 2010-63 A.C. No. 36-02945-200482 Mine: Carbon Plant
	:	CONTEST PROCEEDINGS
	:	Docket No. PENN 2009-736-R Citation No. 7011691; 8/12/09
	:	Docket No. PENN 2009-737-R Citation No. 7011692; 8/12/09
SHAMOKIN FILLER COMPANY, INC., Contestant	:	Docket No. PENN 2009-738-R Citation No. 7011691; 8/13/09 Docket No. PENN 2009-739-R
v.	:	Citation No. 7011952; 8/20/09
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 2009-740-R Citation No. 7011695; 8/25/09 Docket No. PENN 2009-741-R Citation No. 7011696; 8/25/09
	:	Docket No. PENN 2009-742-R Citation No. 7011697; 8/25/09
	:	Docket No. PENN 2009-763-R Citation No. 7011699; 8/27/09

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SHAMOKIN FILLER COMPANY, INC., Contestant	:	Docket No. PENN 2009-776-R
	:	Citation No. 7011700; 8/31/09
	:	
	:	Docket No. PENN 2009-777-R
v.	:	Citation No. 7011781; 8/12/09
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 2009-778-R
	:	Citation No. 7011782; 8/31/09
	:	
	:	Docket No. PENN 2009-779-R
	:	Citation No. 7011783; 8/31/09
	:	
	:	Docket No. PENN 2009-780-R
	:	Citation No. 7011784; 9/01/09
	:	
	:	Mine: Carbon Plant
	:	Mine ID: 36-02945

DECISION

Appearances: Jessica R. Brown, Esquire, Office of the Solicitor, US Department of Labor, Philadelphia, Pennsylvania, for the Petitioner
Adele L. Abrams, Esquire, CMSP, and Diana R. Shroeher, Esquire, for the Respondent, Shamokin Filler Company, Inc.

Before: Judge John Kent Lewis

STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. ("the Act").

The petitions for assessment of civil penalties and associated contest matters in the above-captioned dockets were consolidated for hearing by ALJ Alan G. Paez, who was originally assigned to the case.

By consent of the Court and the parties, the sole question at trial would be limited to whether the federal Mine Safety and Health Administration ("MSHA") has jurisdiction over the subject facility, Carbon Plant.

During the period of discovery, this case was reassigned to the undersigned ALJ on September 10, 2010, by an order of reassignment from Chief ALJ Robert J. Lesnick. The hearing date and location were unaltered by the reassignment. Several motions were filed by the parties

prior to hearing.[1]

On September 27, 2010, The Secretary of Labor ("Secretary") filed with this Court a motion in limine to preclude any evidence of MSHA inspection activity, or lack thereof, at any facility in the United States other than the Respondent's Carbon Plant. On September 27, 2010, for reasons discussed *infra*, this Court, after full hearing and argument, granted Secretary's motion. Pursuant to Commission Rule 70, 29 C.F.R. §2700.70, Shamokin Filler Company, Inc. ("Respondent") moved for stay of the proceedings and requested certification for interlocutory review by the Commission. This Court denied such[2] and the case thereupon proceeded to trial on September 27-28, 2010 in Harrisburg, PA.

LEGAL PRINCIPALS

Section 3(h)(1) of the Act defines "mines" that are intended to be covered under the Act. Section 3(h)(i) provides:

> "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment[.]
>
> Section 3(h)(2)(i) of the Act further defines "the work of preparing coal". Section 3(h)(2)(i) provides:
>
> "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine[.]

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[1]These motions, *inter alia*, included Secretary's Motion in Limine to Exclude the Expert Witness Testimony of Lawrence Gazdick, filed on September 27, 2010, and denied on October 13, 2010; Secretary's Motion in Limine, filed on September 27, 2010, and granted on October 27, 2010; Secretary's Motion to Quash Subpoena, filed on October 18, 2010, and granted on October 20, 2010; and Respondent's Motion to Compel, filed on October 19, 2010, and denied on September 27, 2010.

[2]By Order dated December 10, 2010, the Commission denied Respondent's motion for interlocutory review.

The MSHA/OSHA[3] Interagency Agreement of 1979 ("MOU") further clarifies the jurisdiction of each agency. Concerning jurisdictional disputes, Point 5 of the MOU provides that:

> The following factors, among others, shall be considered in making determinations of what constitutes mineral milling under section 3(h)(1) and whether a physical establishment is subject to either authority by MSHA or OSHA: the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility. The consideration of these factors will reflect Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act.

PROCEDURAL HISTORY

Motion in limine

A preliminary evidentiary issue before this Court was whether Secretary's motion in limine to preclude evidence of MSHA's exercise of jurisdiction in facilities other than Respondent's Carbon Plant should be granted. This Court notes that MSHA's jurisdiction over an individual facility must be decided on a case-by-case basis, looking at both the statutory language and the nature and purpose of the specific facility. *Pennsylvania Electric Company v. FMSHRC*, 969 F.2d 1501 (3d Cir. 1992).

The Respondent argued that the Court should have heard evidence regarding MSHA's lack of exercise of jurisdiction over certain "bagging operations" similar to Respondent's, including MSHA's past deliberations and determinations regarding such. However, this Court holds that such evidence would be irrelevant to and, indeed, detrimental to resolving the critical jurisdictional questions of what the Carbon Plant has been, and is as a facility, and what it has done, and is doing in its operation and processes. (Emphasis added.)

Given that the fundamental jurisdiction inquiry before this Court involves the specific activities and operations of Respondent's particular Carbon Plant facility, this Court found that Respondent's proposed evidence pertaining to some other similar facilities would be essentially irrelevant. See *Ohio Valley Transloading Company*, 19 FMSHRC 813, 813 (Apr. 1997)(Only the facts pertaining to the subject facility were relevant).

Although Commission Rule 63, 29 C.F.R. §2700.63, states that relevant evidence may be presented as long as it is not unduly repetitious or cumulative, the Rules do not define "relevancy" or its limitations. Therefore, the Commission may look to the Federal Rules for guidance. *Cactus*

[3]OSHA refers to the Occupational Health and Safety Administration.

Canyon Quarries of Texas, 23 FMSHRC 280, 287 (2001). Pursuant to Rule 403 of the Federal Rules of Evidence, it is provided that evidence, although relevant, may be excluded if its probative value is, *inter alia*, substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if such introduction involves waste of time or needless presentation of cumulative evidence.

Presentation of evidence of MSHA's lack of enforcement at other similar facilities involves all of the foregoing pejorative evidentiary consequences. This Court finds that it would be cumbersome and impractical to begin the evaluation of the Carbon Plant's jurisdictional question with a review of whether and why MSHA has exercised or should exercise jurisdiction over similar "bagging facilities" located in both the Carbon Plant's specific geographical area and in other parts of the country.

In its prehearing pleading and argument, Respondent requested permission to present evidence that other similar "bagging operations" – principally Keystone Filler and Kimmel – were no longer under MSHA jurisdiction and were direct competitors of Respondent.[4] (Emphasis added.)

This Court rejected said request and granted the Secretary's motion in limine on the grounds that such evidence would be irrelevant and/or, if relevant, unduly confusing and misleading. Ultimately, this Court had to consider whether such evidence would aid it as trier of fact and law in deciding the issue of jurisdiction. For reasons set forth below, this Court found that the admission of such evidence to be utilized in a comparative analysis of similar facilities to that of Carbon Plant would be improper and unreasonable.

This Court finds no appellate case law on point regarding the admissibility of alleged similar facility evidence to establish jurisdiction. However, after careful consideration, this Court is convinced that a comparative facility analysis approach to jurisdiction is improper. Rather than considering the specific characteristics of a particular facility – which is the usual analytical approach in almost all Mine Act cases – the decision-maker must instead engage in unnecessary and often confusing collateral review.

While the ALJ holding in *Dicaperl Minerals Corp.*, 28 FMSHRC 720 (July 2006), has no binding effect, this Court finds the rationale of ALJ Manning in ultimately rejecting similar facility evidence as to jurisdiction to be compelling. In *Dicaperl Minerals*, the subject plant was a free standing perlite (volcanic glass) expansion facility. *Id*. The plant was not located at or adjacent to a quarry. *Id*. The plant operator offered evidence that most, if not all, other perlite plants that were "geographically and operationally separate" from mining operations – just as Dicaperl's plant – were under OSHA jurisdiction.[5] *Id*. at 734. The facility owner further maintained, in arguments

[4] This court finds that evidence showing that a facility is in competition with another facility for some of its products may have little relevance or materiality when determining jurisdiction. Facilities may be distinctly different in overall function and character, but still may offer some similar products, placing themselves in competition for a particular product.

[5] Unlike in the case *sub judice*, more extensive evidence regarding the location and number of similar plants, locally and nationally, was offered.

similar to those advanced by Respondent, that continued inclusions of its plant under MSHA's jurisdiction, while similar perlite facilities were not under MSHA jurisdiction, was unreasonable, defying common sense. *Id*. at 724. The "bizarre result" was that a Dicaperl's facility was the only such facility still under MSHA's jurisdiction, while its competitors were under OSHA jurisdiction. *Id*. at 735.

ALJ Manning initially overruled the Secretary's objections to the introduction of Dicaperl's evidence of MSHA's lack of enforcement at other perlite facilities as being irrelevant. *Id*. at 736. However, he ultimately concluded that MSHA's failure to inspect other perlite facilities was not relevant to the issue of whether the Secretary had the authority to enforce MSHA's standards at the operator's plant. *Id*. ALJ Manning observed that no perlite facility is exactly alike and it would be "quite cumbersome and impractical" for Commission judges, when considering whether a facility should be subject to MSHA jurisdiction, to evaluate whether MSHA should be exercising jurisdiction at similar facilities. *Id*. Essentially concluding that such matters called for case-by-case factual determinations, ALJ Manning held that too many factors come into play in a similar facility jurisdictional analysis. *Id*.

Just as no mine is exactly alike, and no perlite expansion operation is exactly alike, this Court believes no "bagging operation" is exactly alike. To have allowed Respondent's proposed similar facility evidence into the record would have required this Court to embark upon a jurisdictional safari, searching out all similar facilities in the country and comparing like and non-like activities, structures, operations, and products with that of the subject Carbon Plant. (The collateral inquiries would be endless – such as in the present controversy – where this Court would be required to determine why some bagging facilities chose to remain under MSHA jurisdiction.

Given the clear navigational directions for finding jurisdiction set forth in pertinent portions of the Mine Act and MOU, without the need for such evidence, this Court granted the Secretary's motion in limine and rejected the Respondent's proposed similar facility evidence as being irrelevant and as creating unduly burdensome demands.[6]

This Court notes that Respondent was in no way prejudiced by this ruling because it still had the ability to present live and depositional testimony concerning the Carbon Plant's nature, purpose, and specific activities; photographic and documentary evidence in support of the foregoing; and expert witness testimony in support of the foregoing. Further, it could present evidence establishing or tending to prove that MSHA, in or about 2004 or thereafter, determined that the Carbon Plant should have been excluded from MSHA jurisdiction and any evidence showing that determination was conveyed to the Respondent.

FACTUAL BACKGROUND AND SUMMARY OF TESTIMONY

The Respondent operates a facility in Shamokin, Pennsylvania, that sells products consisting

[6] Further, if this court would have allowed Respondent's proposed evidence, as set forth in its offers of proof, it would have accorded such little probative value in light of this court's analysis of the law and assessment of evidence and witness credibility, as discussed *intra*.

of anthracite coal that is unmixed, as well as anthracite coal that is blended with other carbonaceous materials. It further manufactures a variety of carbon-based products for the steel, glass, rubber and plastics industries. Prior to hearing, the parties stipulated that the Respondent neither extracts, washes, cleans, or crushes coal in its Carbon Plant that is at issue nor does it own any mines or subsidiaries that perform these functions. Shortly after assuming ownership of Shamokin Filler Company, the new owners[7], Don and William Rosini, requested that MSHA determine that the Carbon Plant should properly be under the jurisdiction of OSHA, rather than MSHA.

The witnesses at hearing testified as follows:

Matthew Bierman: Bierman is a coal mine inspector for MSHA. Prior to his becoming an inspector, he worked for Jeddo Coal Company, a surface anthracite coal operation in Hazelton, Pennsylvania, where he was a foreman in the preparation plant which included doing some quality control work. He has a degree in Environmental Resource Management. Geology classes were required in obtaining this degree. He testified that no coal is one hundred percent coal; rather, the normal scale for anthracite coal is typically between eighty-seven and ninety-two percent (87-92%). (Tr. 44-45.)

As part of his employment as an inspector, he was required to administer three complete health and safety inspections, or E01 inspections, at Respondent's Carbon Plant. These inspections involve approximately forty to fifty (40-50) hours on site. Although his last full inspection was in August 2009, he was sent to the Carbon Plant in October 2009 for the purposes of observing the flow of coal at the Carbon Plant and reporting back to his supervisors because the Respondent had challenged MSHA's jurisdiction over the facility. (Tr. 46-49.)

In his PowerPoint, Bierman first showed piles of coal, which he explains has already been washed and sized prior to arriving at the Carbon Plant. Second, explained that the feed hopper is what coal is put into before it proceeds by conveyor unit to the dryer. In the dryer, a heating unit blows hot air through a tube as it rotates. Because it is slightly sloped, the coal is dried as it moves down the tube. From here, the coal enters the screens. As the screen gyrates and circulates across the material, the oversized material is removed and the needed material falls through. He testified that the Carbon Plant has two different kinds of screens because they produce different products with the materials from the different screens. After screening, the Respondent's employees informed Bierman that the coal is then moved to storage bins until it is loaded or bagged. Bierman never made a formal inquiry to management whether this process was correct. (Tr. 49-53.)

Although he acknowledged that the facility also packaged and sold graphite pellets, this was not a primary concern of his inspections. This process was only important to him in that the inside dryer typically used to dry graphite was sometimes used to dry coal when the outside dryer was not working. The inside feed hopper was used for coal at this time as well. Bierman further testified that the Respondent's facility includes a lab, where its products are inspected for quality control

[7] Though Respondent's description of the Rosini cousins as being new owners is technically accurate, they are in fact sons of the original Rosini owners, who were brother-partners and still are on Respondent's payroll. Shamokin Filler is a subchapter S corporation. (Tr. 385.)

reasons. Here, the Respondent could ensure that the materials it produces meets the customer's specifications. (Tr. 54-60.)

Not only did employees tell Bierman that coal was being stored, but they also told him that they did not typically mix the coal with any other materials. Again, Bierman never confirmed this with management, nor did he test any of the bags of materials located on site. He did, however, testify that he saw hundreds of tons of coal at the facility while the existence of metallurgical and petroleum coke, which are not covered under the Mine Act, was much less prevalent. These measurements were adduced by estimation rather than scientific calculations. (Tr. 54, 62.)

John Petrulich: Petrulich was the former production manager at Respondent's Carbon Plant. In this position, he testified that his primary duties were the coordination of different orders to ensure that they were shipped on time, the control of the information flow as to what products were to be run by production, the training of lab technicians, the interviewing and hiring of some general laborers, and the revision and implementation of standard operating procedures. He was later terminated after an agreement. The reason for termination listed on his unemployment papers was "attitude." (Tr. 97, 99.)

In his role of training the lab technicians, Petrulich demonstrated how to check moisture content both after receiving the coal and after drying to ensure that the levels were acceptable. He also monitored the sulfur values and ash content of the coal. Because of these roles, he had to be familiar with the makeup of the Respondent's products. Knowing the specifications of the products was also important because individual customers needed materials at different specifications. Petrulich was not as familiar with the actual processing that occurred on site. (Tr. 97, 98, 100, 101.)

Petrulich also testified that coke was used more as an additive or filler. The coal, however, was not necessarily changed into something else because the coke was added to it. Rather, the coke was used as a cost effective weight increase and could have just as well have been alternative fillers, but the bulk of the bag content was ultimately coal. However, he later testified that there were several Carbon Plant products that contained no coal whatsoever. He also testified that due to the properties of most of the non-coal materials, it could not be mistaken for coal easily. His one caveat was that coal was often crushed into fine dust from the weight of the "supersacks,"[8] which could look like carbon black to an untrained eye. (Tr. 101-105.)

Next, Petrulich testified to emails that were sent both to customers concerning Respondent's products and among employees of the Carbon Plant as well as the owners in the days leading up to a visit by MSHA, that will be explained in more detail *infra*. One string of emails demonstrates that a customer was questioning the specifics of one product and owner, William Rosini responded by writing that Shamokin B-593 is "100 percent anthracite coal and barley size." The other emails were concerned with the jurisdictional visit that members of MSHA were to conduct on July 28, 2009. The first email stated, "We need to convince [MSHA] that we blend many things together to make our products. Do we have piles of different types of carbon sitting around?" William Rosini

[8]Supersacks are one-ton bags of coal or other products that are sold on the market.

replied that their were and each type should be jarred and labeled. When Petrulich asked if he was to retrieve, jar, and label each, William Rosini told him just to retrieve it and Rosini would label it himself. Later that day, William Rosini send an email saying "It's probably a horrible idea to be running straight coal when they come. Let's mix the met coke with it while there are there." The last string of emails were sent from Donald Rosini writing, "Even the mystery bank can be represented as a coke and graphite blend." William Rosini responded, "If need be we can demonstrate by cutting a sack of material on the pile." (Tr. 110-111, 113, 115-120.)

In explaining the purpose of the emails, Petrulich testified that the owners were attempting to "trick" MSHA into believing that its continued jurisdiction over the Carbon Plant was improper. The Respondent had never previously suggested putting graphite or coke into a pile of coal. Further, he stated that the coal and graphite were even separated on the mystery bank during the period of time that he worked there. Even under cross-examination, he maintained that he had no belief that the owners were simply attempting to demonstrate the full range of their products and processes. But he did admit that he did not know whether any of the ideas spoken in the emails came to fruition. (Tr. 114, 121-22, 134-139, 141-142.)

Ronald Farrell: Farrell is a coal mine inspector for MSHA, who only inspects surface mines. Prior to working for MSHA, he worked at a coal processing plant and strip mine for nearly twenty-eight (28) years as a coal inspector, a second-shift supervisor, and a day-shift supervisor. He has only inspected the Respondent's Carbon Plant. He testified that during each E01 inspection, they must inspect the entire facility and at the date of this hearing, he had last been there in September 2010. During his inspections of the Carbon Plant, he observed employees "stockpiling [coal], picking it up, feeding it into a feed hopper, drying it, screening it, and loading it out for sale." He had only been to Respondent's Carbon Plant for the purposes of inspections, never to specifically monitor the flow of coal. (Tr. 162-164.)

During an inspection on March 8, 2010, Farrell asked an employee[9] to explain the Carbon Plant's processes. He described the process as follows: "Coal from several sources is fed to the dryer. Then up a bucket elevator, sized, then goes to the proper phase. They make three products, Barley, No. 5 and 20, all coal." He wrote this information down because his supervisor had accompanied him on the inspection and was unfamiliar with the Carbon Plant's processes. He did not sample or analyze the coal and recognizes that it may have been mixed with another carbonaceous product although the employee did not allude to that when he told Farrell about the process. He did not ask management about the correctness of this statement, and he did not ask the employee about the manufacturing processes that occur on other parts of the Respondent's property. (Tr. 168-169.)

Although Farrell was not part of the 2004 jurisdictional fact-finding committee specifically for the Respondent's Carbon Plant[10], he testified that he was aware that a discussion was held about the jurisdiction of the Respondent's Carbon Plant and it was later decided that no actual offer was to be made. This differed from his deposition testimony indicating that an offer had been made. He

[9]The employee's name was redacted for anonymity purposes.

[10]Farrell was a part of the fact-finding committee for other facilities.

explained that he had assumed an offer had been made from conversations that he had overheard around the office. Later, though, other documents were produced, mainly written replies from two other facilities, to clarify that he had heard incorrectly. He could not state, however, whether the Carbon Plant was, in fact, given no offer to opt out of MSHA jurisdiction or whether the options given to these other two facilities were absolute options to move under OSHA jurisdiction. (Tr. 171-173.)

Farrell reviewed the report regarding the Carbon Plant and testified that the report was not a detailed description of the Respondent's activities. He also noted that it was much less detailed than the report that he completed for a different facility. It failed to mention the blending of non-mine materials with the coal and the existence of some products that were entirely non-mined materials. He further testified that Bierman's PowerPoint was not an accurate detailed description of the Carbon Plant because it too failed to acknowledge the existence of several materials and processes at the facility. (Tr. 184, 208-210, 216-218.)

Farrell conceded that MSHA does not have any specific safety standards that pertain to manufacturing, but he stated that he believed that the Respondent's products should be considered processed coal and under MSHA jurisdiction. In his deposition, he stated he would not consider a product that was forty percent (40%) coal to be a "mined product," but now that he understands what metallurgical coke is, his answer would be different. (Tr. 118, 223)

Patrick Boylan: Boylan is currently the senior staff investigator and staff assistant with MSHA whose duties include accident coordination, peer review coordination, and 110 investigations under the Act. He was previously a conference and litigation representative in District 1, a promotion from an underground mine inspector. He began his mining career at the Reading Anthracite Coal Company breaker, or custom coal preparation plant, where he worked for twenty (20) years. He has been to Respondent's Carbon Plant and last inspected it in 2004. (Tr. 233-236.)

Boylan spoke to and obtained a declaration from Ricky Rollins, the manager of Steel Dynamics, indicating the company purchased about 4,300 tons of Shamokin 585 from the Respondent, who advertised that the product was one hundred percent (100%) coal and not a mixture. Boylan did not know, and made no assertion that, Rollins checked the ash and sulfur content to ensure that the product was completely anthracite coal. Further, he acknowledges that there really is no such product as one hundred percent (100%) anthracite coal from a technical standpoint. (Tr. 246-249.)

In 2004, Boylan was part of the fact-finding committee. He, however, did not know whether a jurisdictional determination concerning Respondent's Carbon Plant had been made. He acknowledged that the Respondent does not extract coal and is not affiliated with any mines that do. He also acknowledged that the Respondent is actually a customer of preparation plants and breakers in District 1. (Tr. 251, 255-257.)

Thomas Yencho: Yencho is the field office supervisor for MSHA in Shamokin, Pennsylvania. In his position, he leads inspectors in their inspection of approximately 120 surface mines, roughly half of which are strip mines and the other half are facilities. He does field activity reviews and company

activities every six months with each inspector. He must personally visit every mine at least once annually. Prior to his position with MSHA, he worked for Jeddo Highland Coal Company for fourteen (14) years and for Reading Anthracite Coal Company for ten (10) years. He has never worked at a coal preparation plant, nor has he ever inspected the Respondent's facility. (Tr. 258-260.)

Yencho became the field office supervisor in 2004. He discovered the Respondent's intention to challenge MSHA jurisdiction from the District[11] in 2009. During this call, he also learned that they were to visit the site to conduct fact-finding; he testified that in preparation for this visit, he asked Bierman to create a PowerPoint concerning the flow of coal at the facility. Rather than have Bierman make a special visit to the facility to obtain the information, he had him create it from memory as a way to inform the solicitors when they arrived for the jurisdictional visit. (Tr. 260-261.)

During the visit, Yencho testified that they met in the mining office where nine or ten vials of coal and non-coal materials were demonstrated. They company informed them of what was in some of the vials but refused, for proprietary reasons to explain the makeup of others. Then, they toured the stockpiles, where Yencho testified that he saw No. 4 and No. 5 coal, as well as graphite, and possibly metallurgical or petroleum coke. Next, they toured the inside of the building and finished by looking at the outside dryer and the area where the materials are bagged. He testified that while they were at the facility, he believed that they were processing either No. 4 or No. 5 coal and he did not see any mixing activities being conducted. The owners mostly talked about mixing activities as they approached the graphite pellet mill, but did talk about mixing coal with the non-coal materials as well. (Tr. 262-263, 322-323.)

While accompanying inspectors in previous inspections, Yencho observed coal being loaded in the hopper of the top dryer. He admitted, however, that he did not "stand there and observe [the employee] for hours and hours and hours." In his opinion, he testified that the Respondent's drying and screening of coal would place them under the jurisdiction of MSHA. (Tr. 264-265.)

Yencho also testified that no offer was made to the Respondent following the fact-finding committee's jurisdictional determinations in 2004. This contradicted his past deposition testimony that he had personally went to the Respondent and made an offer. However, upon checking his time and activity records for the time in question, he discovered that he was at the Mine Academy. Further, he testified that no "offer" was made. He explained that he had no authority to make an offer and that he was trying to clear that up in the second day of his deposition by explaining that the letter writing process would have to be followed and that "offer" was a poor choice of words. (Tr. 266-268, 274, 280, 283, 290.)

When asked about the lack of detail in the Respondent's report prepared by inspectors Kathleen Radzavicz and Joe Fisher, Yencho testified that he trusted what they had prepared. He explained that they may not have seen any of the Respondent's non-coal-related manufacturing activities, and therefore, could not have documented them in their report. He also testified that the

[11]Although it was not further clarified at hearing, it is assumed that this refers to District 1.

reports were then sent to the District, but he did not know their fate from that point forward. He could only assume that they were given consideration. (Tr. 296, 334, 353.)

William Sparvieri: Sparvieri was the former assistant district manager for MSHA in District 1. Also, briefly in 2004, approximately two or three months, he was the acting district manager in that District. When the issue of jurisdiction first arose in 2004, he organized the fact finding committee to visit each operator and determine what activities were taking place. At the time that the committee was established, no decision had been made as to whether MSHA should be exercising jurisdiction over other facilities, nor did Sparvieri have the authority to release the Respondent, or any other facility, from MSHA jurisdiction. (Tr. 368-369.)

Although Sparvieri did not visit the Carbon Plant with the fact finding committee, the result of the facts gathered were that it met the criteria of being classified as a mine. He admitted that the report does not reflect any of the manufacturing activities that take place on the premises; however, he said that this would have no reflection on the issue of jurisdiction because of the amount of activities performed that fall under the Act. This result was then sent to the district manager, but, as far as Sparvieri knows, was never forwarded to the Office of the Solicitor or the MSHA administration office. Neither his signature nor Yencho's appear on the report for the Carbon Plant. (Tr. 370, 373-374.)

When questioned why different inspectors were sent to Keystone Filler Company[12] than the Carbon Plant, Sparvieri explained that time constraints forced them to add inspectors to the fact-finding committee. Boylan and Farrell were not originally part of the fact finding committee, but had to later be added. Radzavicz and Fisher were the two inspectors who were assigned to visit all of the facilities when the fact-finding committee began its jurisdictional inquiry. (Tr. 376.)

Donald Rosini: Donald Rosini is the owner and president of Respondent with fifty percent (50%) ownership. The Carbon Plant was previously under the ownership of his father and uncle. Donald Rosini attended the University of Pennsylvania and received his Bachelor's degree in economics from the Wharton School where he double majored in finance and management. After school, he traded derivatives in Philadelphia for Susquehanna International Group and later traded currency derivatives in Tokyo, Japan for ten years with Chase Manhattan Bank and Bank of New York. At the time of the financial meltdown in 2008, he was trading bonds back in Philadelphia for Susquehanna. At that time, he returned home and joined the Respondent. (Tr. 381-383.)

Prior to becoming a derivative trader, Donald Rosini testified that he had never actually worked for the Respondent, but he would assist his father in doing financial projections and engage in discussions about the business in an unpaid capacity. Now, neither his father nor his uncle are active in the management of the business, but Donald Rosini explained that they are still on the payroll as consultants and that he and his cousin talk to the former owners everyday or nearly

[12]Keystone Filler Company was released from MSHA jurisdiction in 2004, after the fact-finding committee concluded that it would more appropriately be under OSHA jurisdiction and, based on the committees report, either MSHA administration or the Office of the Solicitor, in fact, released them from MSHA jurisdiction.

everyday. (Tr. 383.)

Under the former ownership, both men were active in all aspects of the company. Under this ownership, Donald Rosini testified that there is somewhat more of a division of labor. He describes himself as the Chief Financial Officer (CFO). He looks at the company's assets and resources and attempts to determine how they can most efficiently be employed. He further engages in financial projections to determine which processes need to be carried out more efficiently and in what direction the company should further go. William Rosini, his cousin and co-owner, was more active in the production specifications of each product and the sale of the finished product. (Tr. 384.)

Donald Rosini testified that, in early 2009, he decided to challenge MSHA jurisdiction. He said that decision was made based upon projections for the future of their company. He testified that they are expanding and the processes now being employed focus much more on the manufacturing of items, such as graphite paint, than the activities that are found under the Act. Because of these changes, he proffered that OSHA seemed to be the more appropriate jurisdiction. As evidence of this, he testified that there are no risks of silicosis and there are no steep grades at the facility, which are two issues that MSHA works with quite a bit. Further, his employees complain that MSHA training seems like a waste of time to them because many of the issues are irrelevant to the Carbon Plant. When asked if he talked to his father prior to the jurisdictional challenge, he testified that he had spoken to him and his father said that he had been afraid of MSHA retaliation if he challenged its jurisdiction. (Tr. 386-388.)

Leading up to the Respondent's jurisdictional challenge, Donald Rosini talked to a number of people, including individuals at Keystone Filler and Kimmel. From these discussions, he was referred to the lawyer who wrote to MSHA for both requesting a release from jurisdiction. Donald Rosini testified that the letter was written and a meeting was to be arranged. However, MSHA was unable to produce a copy of the letter from its records and the Respondent claimed that it never received a copy of the letter for which it paid. Under cross-examination, he admitted that he does not ever remember seeing the letter at all and, in fact, he is relying on a confirmation email sent from the attorney stating that the challenge letter had been sent. Respondent was presented with a letter from its present counsel explaining that the request for jurisdiction transfer had been denied. The denial was based upon the number of activities that constituted activities under the Act. (Tr. 389-390, 394-395, 479.)

When describing the products offered by the Respondent, Donald Rosini testified that approximately twenty percent (20%) are straight coal, seventy percent (70%) are a coal blend, and the remaining ten percent (10%) are comprised entirely of non-mined materials. He further stated that their product list is constantly in flux because William Rosini is constantly making up new products depending on the specifications needed by the customers. In response to the testimony that MSHA employees had never seen coal being blended in the dryers, Donald Rosini said that he was certain that they had seen it but were completely unaware of it; although, he opined that they should have realized that blending was taking place. (Tr. 408, 412-413, 416-417.)

In response to Petrulich's interpretation of the emails prior to the MSHA business, Donald Rosini testified that the Respondent was attempting to give MSHA the complete view of its business

activities. The labeling of the vials was done to ensure that the visitors would get the full scope of the blending activities. He did not address the suspect wording of the email. When asked about the email that he sent suggesting that they could cut a sack of material on the mystery bank, he testified that he did not know his intention of the email and that no action was taken on the suggestion. (Tr. 435-437, 441.)

Under cross-examination, Donald Rosini admitted that he had never heard of the offer to opt out of MSHA jurisdiction until the deposition of Yencho. It was at this time that he asked his father about it. William Rosini's father also said that no offer had been made to them when asked. He also acknowledged that while he felt that the Carbon Plant was being retaliated against for its challenging jurisdiction, he had no knowledge that fine amounts had risen, in general, by the passage of the Miner Act. (Tr. 447-448, 469.)

David Pfleegor: Pfleegor is the president of Keystone Filler and Manufacturing Company in Muncy, Pennsylvania, which is a competitor of the Respondent's Carbon Plant. He testified that it processes carbon into mineral fillers and carbon products for the steel industry. These products are essentially the same as those produced by the Respondent. (Tr. 484-485.)

Pfleegor testified that, in 2004, inspector Paul Sargent came to the plant to alert them that they were no longer going to be under MSHA jurisdiction. This inspector also said that they would be releasing "the rest of the companies, Shamokin Filler, Leopold, and named numerous companies that they were probably going to have to release." He said that the inspector explained that the Respondent would be released because it was the same type of operation as Keystone and Keystone had just been released. However, Pfleegor admitted that he had no idea whether Sargent had any authority to make these types of jurisdictional decisions or whether he was just assuming. Further, he backed off of his certain testimony by saying that Sargent said the other facilities were "probably going to be released." (Tr. 486-488.)

Kathleen Radzavicz: Radzavicz is a conference and litigation representative for MSHA, District 1, Coal, in the Wilkes-Barre office. Prior to this role, she was a coal mine inspector health specialist, but has never actually worked in a mine. She was chosen as part of the fact finding committee because she handles all problems dealing with repeat test sampling because of testing disclosures. Along with Joe Fisher, she was assigned by Sparvieri to visit the Respondent's Carbon Plant and write the fact-finding committee report. Although she was not present during the visit to Keystone, she compiled the information and wrote the report for that facility as well. (Tr. 495-497, 499, 501.)

The report on the Carbon Plant was to be written to detail the on-site processes, specifically focusing on the flow of coal. Although graphite was mentioned in the report written, none of the other materials on-site were mentioned; there was also no mention of other processes that occur on-site. She said that she did not see any other processes being conducted while she was at the facility. Radzavicz testified that she realized that the report was less detailed. She admitted that she did not take any samples at the Carbon Plant. But she also testified that she did not know that samples had been taken at Keystone until she wrote the report, after her jurisdiction visit to the Carbon Plant. During her visit to the Carbon Plant, she was given the impression that the Respondent was a custom coal preparation facility. Further, the Respondent's owners would not give permission for the

inspectors to take pictures of the facility. (Tr. 497, 500-502, 509-510.)

Radzavicz testified that she did not know what happened to the report after she gave it to her supervisor, Jack Kuzar. She was never given feedback on the report and did not know what the ultimate purpose behind the report was. She testified that she realized that the jurisdictional visit was conducted in response to Keystone's jurisdictional challenge, but she was only told to observe the day-to-day operation at the Carbon Plant with particular interest in the coal flow. No one at the Carbon Plant told her that coal was being mixed with other materials while she was conducting the visit, even though she testified that she spoken to someone in management. (Tr. 512-514, 518, 521.)

William Rosini: William Rosini is Respondent's owner, along with Donald Rosini, chairman, and secretary/treasurer. He owns twenty-five percent (25%) of the company, but speaks for his sister's twenty-five percent (25%) as well. He attended Bloomberg University and received degrees in psychology and sociology with a minor in business, but he testified that he has worked for the Respondent nearly all of his life. (Tr. 523.)

William Rosini testified to the nature of the business by saying, "We manufacture all types of carbons. It involves getting materials from across the United States, is mostly what I do, trying to find scrap products, find anthracite coal, petroleum coke, metallurgical coke. We buy some carbon black. We do a number of things with it, mostly drying and – We do whatever the customer actually wants, to be honest with you." He then testified that the company is engaged in the same activities that it was thirty (30) years ago, with no substantial changes in equipment, products, or customers. The Respondent does not have a mine permit in the state of Pennsylvania. (Tr. 524-526.)

William Rosini further testified that he spoke with Ricky Rollins, who gave the signed statement to Boylan that the Shamokin 585 was 100% anthracite coal. He said that Rollins avoided phone calls four or five times and then eventually just signed the prepared statement. Also, he said that Rollins was aware that the products were not really 100% anthracite coal from the conversations they had, both prior to and after the email. As far as Petrulich was concerned, although he was hired as a lab technician to perform quality control, William Rossini dismissed his position as basically a gofer, who was there more or less for employee morale. He testified that Petrulich was not a production manager and would not have directed the product formulation, because he did not have access to the customer specifications. (Tr. 530-532, 534, 536-537.)

In explaining the emails before the MSHA visit, William Rosini testified that Donald Rosini had not been at the stockpiles for a while and wanted to make sure that all of the materials used in the products were accurately presented. William Rosini asserted that Donald Rosini was not attempting to misrepresent the facility or trying to trick MSHA inspectors. William Rosini said that his intent with email stating that he would label all the materials was written because he did not believe that anyone else would do what he was asking. He explained that he did not want to be running straight coal because he knew that MSHA was under the impression that they were a mine, but that they ended up running straight coal that day anyway, so the email was pointless. Further, he explained that the email calling for the possible cutting of a bag of material on the mystery bank because he wanted to demonstrate they really do mix metallurgical coke with anthracite coal on a

regular basis. Finally, he explained the email representing Shamokin B-593 as 100% anthracite coal as either "sales" speak or a typographical error. (Tr. 539-540, 543-545, 547-548, 551, 571.)

Under cross-examination, William Rosini admitted that many of the carbonaceous products they have listed on-site are not mixed with the anthracite coal unless there is a specific need for it. He also said that metallurgical coke and coal are the only two materials stockpiled at the top of the facility at this time. Further, these are the two materials that are most frequently mixed. When asked on direct examination about some other materials, limestone, glycerine, etc., William Rosini testified that they were kept at the facility and used. However, under cross-examination, he admitted that their use was fairly rare and only for particular purposes. When asked about a 5/16th inch screen, he said that the facility does not have this size screen now and that he had never heard his father talk about one, but he was not sure if that sized screen was at the facility before he started working there. He did say that he would not have been sure what use his father and uncle would have had for it. (Tr. 541-543, 550, 558, 563-566, 582-583.)

Lawrence Gazdick: Gazdick was a maintenance foreman with Jeddo Highland Coal Company for fourteen years. For the next eight years, he designed, built, and operated preparation plants for the same Company. He later worked for Pennsylvania Power & Light Company were he was a design draftsman and his specialty was preparation of coal to feed the generating stations and generating station design. In 1991, he was hired as a surface inspector for MSHA. Over his sixteen years of experience in MSHA he was promoted to underground inspector, surface specialist, and eventually to the position of supervisor of underground mines at the Pottsville field office. At one point, he held the position of senior special investigator, staff assistant to the district manager in District 1, who was Jack Kuzar. Gazdick is currently working as a consultant to coal industry. (Tr. 586-589.)

During his time as senior special investigator, the fact finding committee to determine the jurisdiction of the bagging facilities was assembled. Gazdick testified that the Respondent was under the scrutiny of the fact finding committee and, further, he had been to the Carbon Plant both in his capacity as an inspector and as an assistant to Jack Kuzar in performing "walk and talk" safety talks at the facility. He also observed the facility prior to writing his expert report. He testified that the facility looks exactly as it did when he inspected for the first time. The equipment and operations were identical to 2004. (Tr. 589, 594, 596-597.)

He testified that, in his experience the Respondent's Carbon Plant is not similar to the coal preparation plants that he has worked for and designed in the past. The Respondent has no equivalent operation to those that would process extracted coal. They do not deal in several sizes of coal and they do not wash it. They also have no equipment on site allowing them to change the size or the quality of the coal like a normal breaker would. They can only buy coal that has already been prepared by another facility. (Tr. 589.)

He testified that the Respondent does screen the coal as it enters the dryer. This is to prevent damage to the equipment by pieces of coal that are too large. He said that this quarter-inch screening could be considered incidental to jurisdiction under the Act. He further testified that the drying, storing, and loading of coal can also be considered incidental to jurisdiction. He was concerned that the PowerPoint by Bierman mentioned media filter, which is a process that is covered

under the Act and could have erroneously caused members of the fact finding committee to conclude that the Carbon Plant should be retained under MSHA jurisdiction. In his expert opinion, the Plant should be under OSHA jurisdiction because the regulation under OSHA are a better fit for this type of facility and would enhance the safety and training of its employees. (Tr. 603-607, 610.)

Under cross-examination, Gazdick admitted that the Act does cover custom coal facilities, but he testified that coal is only one of many products that they used. However, he acknowledged that it would also depend upon the processes that follow as well. He did not take any samples of the products at the Carbon Plant. Although Gazdick recognizes that the Respondent's process does involve "changing the moisture content of the coal," he does not refer to that process as drying. Further, he did not know of any case law, provision in the MOU, or program policy letters that concluded that bagging facilities should not be covered under MSHA, even if they are just bagging materials. Finally, he admitted that he is currently involved in the litigation an EEO complaint that he filed against MSHA and is appealing in federal District Court after an administrative law judge ruled against him. (Tr. 627, 632-633, 636-637, 639-640.)

ISSUES

The general issue before this Court is whether Respondent's Carbon Plant facility is subject to MSHA jurisdiction based on whether the Carbon Plant was/is a "coal or other mine" within the meaning of Section 3(h)(1)(c) of the Mine Act, and/or whether the Carbon Plant had engaged/is engaging in the "work of preparing the coal" within the meaning of Section 3(h)(2)(i) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Alleged past MSHA jurisdictional determination

Before addressing the specific jurisdictional questions of whether the Carbon Plant constitutes a "coal or other mine" and/or whether it is engaging in the "work of preparing coal," this Court will address the evidentiary/factual issue of whether MSHA had in fact determined the Carbon Plant should be given the option to go under OSHA and/or had conveyed such to Respondent.

Respondent has variously argued that such a jurisdictional determination had taken place, that such a determination should be afforded deference, and that MSHA/the Secretary's failure to effectuate said determination constituted arbitrary and capricious conduct. This Court accepts – as a general proposition – that a past MSHA "determination" would be a legitimate consideration in deciding a facility's jurisdictional status. However, this Court finds it unnecessary to address any of Respondent's associated legal arguments in that such are posited upon a critical factual assumption – that MSHA had in fact previously determined that it should no longer exercise jurisdiction over the Carbon Plant. After careful review of the record, including an assessment of witness credibility, this Court finds that Respondent has failed to carry its burden of proof as to this factual claim.

It is uncontroverted that MSHA had exercised jurisdiction over the Carbon Plant for

decades, and indeed, for generations of Rosini ownership. (Ex. G-7.) At hearing, the Secretary maintained that no specific determinations had ever been made that the Carbon Plant should be excluded from MSHA jurisdiction, nor had any offer to opt out of MSHA jurisdiction ever been extended to Respondent. (Tr. 39-40.) No written proof was offered by Respondent to support its contention.[13] The evidence presented by Respondent at hearing was sparse and contradictory. Neither of the previous owners were called to testify, nor were written statements or depositions by such offered into evidence. Given Donald Rossini's testimony that the prior owners were still on the payroll, were still consultants, and still continued to discuss the "business [...] everyday" (Tr. at 383.), the Respondent's failure to produce the past owners at hearing is puzzling to this Court. (See, however, *infra* one possible explanation for Respondent's failure.)

At hearing Thomas Yencho, the field office supervisor for MSHA in Shamokin, Pennsylvania, testified that no offers to leave MSHA jurisdiction had ever been made to Respondent in 2004. (Tr. 265-267.) Yencho explained that he had been incorrect in past recollections at a prior deposition. After reflection and after review of his "T and A" records, Yencho concluded that he could not have gone to Respondent's facility to make such an offer during the time in question. Further, he would not have had in any case the authority to do so. (Tr. 268-280.)

Despite the Respondent's vigorous cross-examination, alleged discovery surprise and attempted impeachment of Yencho, this Court found Yencho credible. *Inter alia*, this Court reached its credibility assessment in considering the testimony of one of Respondent's principal witnesses, Donald Rosini. When questioned as to whether either of the prior owners, the senior Rosini brothers, had reported that such a critical jurisdictional offer ever was made, Donald Rosini admitted that both said it "never happened." (Tr. 447-448.) Thus, both senior owners' recollections contradicted the assertions of Respondent and support and corroborate Yencho's hearing testimony.

Further at hearing, Donald Rosini raised for the first time an assertion that prior owners had failed to challenge jurisdiction in the past due to fears of retaliation by MSHA (Tr. at 387-388). This Court finds no credible evidence in the record supporting such an allegation. That MSHA employees would somehow become personally enraged over Respondent's questioning of its jurisdiction status strains this Court's credulity.[14] Mr. Rosini's further assertion that an increase in citations after the Respondent's jurisdictional challenge was proof of MSHA's animus is rejected by this Court as a fallacious "post ergo propter hoc" (after this, therefore because of this) proposition.

As agreed by the parties, the validity of the underlying citations/contests/penalty petitions would not be considered by this Court at this time. Without a full hearing regarding such, this Court

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[13] As announced by this Court at hearing, an *in camera* review of the memoranda that was subject of Respondent's motion to compel contained no specific reference to the Carbon Plant (See Tr. at 24-25).

[14]Donald Rosini's testimony was further undermined by the Respondent's failure to produce a copy of a letter contesting jurisdiction allegedly written by counsel retained by the Respondent. That Mr. Rosini, a Wharton school graduate and owner and president of Shamokin Filler Company, did not have even a copy of a letter for which an attorney charged $7,500 likewise strains credulity (Tr. 389-390).

cannot assign sinister motivations to MSHA based upon a general bald accusation of malevolence.

Respondent's reliance upon the speculations of Ronald Farrell as to the import of conversations on which he had eavesdropped to prove its factual contention calls for this Court to essentially speculate on speculation.

The proof presented by Respondent is simply too thin a layer of evidentiary ice for this Court to base a finding of fact. Therefore, this Court, as trier-of-fact, finds that the Respondent failed to establish that any specific jurisdictional determination was ever made by MSHA or offer to opt out of MSHA ever conveyed to the Respondent.

II. Jurisdictional Analysis

The Respondent maintains that the Carbon Plant is a "sophisticated manufacturer of carbon products" that properly should be under OSHA jurisdiction. The Secretary, however, maintains that the Carbon Plant may reasonably be construed as a "custom coal preparation facility" within the meaning of the Mine Act.

This Court notes that when Congress passed the Mine Act, the report of the Senate committee on Human Resources stated that "it is the Committee's intention that what is considered to be a mine and to be regulated under this Act shall be give the broadest possible interpretation and it is the intent of this committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." (*S. Rep. No. 95-181* at 14 (1977, reprinted in *Senate subcomm. on Labor, comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978))(emphasis added). Thus, any jurisdiction search must use this Congressional mandate as its north star.

A further navigational aid in finding jurisdiction is the Interagency Agreement between the Mine Safety and Health Administrative, U.S. Department of Labor and the Occupational Safety and Health Administration, U.S. Department of Labor (March 29, 1979). Like the Mine Act, this agreement is inclusive rather than exclusive in considering MSHA's jurisdiction, again providing that doubts regarding MSHA/OSHA jurisdiction be resolved in favor of Mine Act coverage. (See MOU at §A.3, Authority and Principle and §B.5, Clarification of Authority; see also *Nelson Quarries Inc.*, 2010 WL 4362432 FMSHRC (Oct. 2010) (ALJ)).

Given the "broadest possible interpretation" to what constitutes "a coal or other mine" and what constitutes "work of preparing coal" and the Congressional and interagency directives to resolve doubts in favor of Mine Act coverage, this Court is constrained to find that the Carbon Plant falls within the "sweeping" definition of a mine engaged in the work of preparing coal, and thus, should remain subject to MSHA jurisdiction. (*See also Secretary of Labor v. Sturdt's Ferry Preparation Company*, 602 F.2d 589, 592 (July 1979).

This Court also reaches this decision despite factually accepting that the Carbon Plant uses non-mined materials in some of its operations and recognizing that "every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section

3(h)." *Secretary of Labor v. Carolina Stalite Company*, 734 F.2d 1547, 1551 (May 1984). Further, the Court agrees with the Secretary's position that the testified-to activities at the Carbon Plant fall within the ambit of "preparing the coal," though again recognizing that the nature of the activities performed at the plant must be considered along with the activities listed in section 3(h)(2)(i) of the Act. (*See also Mineral Coal Sales, Inc.*, 7 FMSHRC 615, 619 (May 1985). This Court specifically finds that the Secretary, by a preponderance of the evidence, proved that such activities as storing, loading, sizing ,and drying of (anthracite) coal took place at Respondent's facility and that the overall purpose of Respondent's operation was that of a custom (coal) preparation facility as broadly defined in section 3 of the Act.

At hearing, Inspector Bierman testified that the anthracite coal was delivered and stored in a "lay down" area on the north side of the Carbon Plant. (Tr. 49, Ex. 2.) The coal was prepared by being placed in a feed hopper and then dried in the outdoor rotary dryer. The coal was then screened to remove over-sized pieces. (Tr. 49-51, 164, Ex. 2.) Following this preparation, coal is stored at the Carbon Plant. (Tr. 51, Ex. 2.) Coal is then bagged, loaded, and shipped for bulk sale in trucks and rail cars. (Tr. 52-53, Ex. 2.) Ronald Farrell testified that he had inspected the Carbon Plant in March 2010, and had questioned a miner regarding the operation of an outside dryer. Reading from his notes taken at the scene, Inspector Farrell indicated that, according to the miner, coal from several sources was fed to the dryer, then up a bucket elevator, sized, then went "to the proper phase." All the products made were coal. (Tr. 168-169.) At hearing Thomas Yencho testified that while at the Carbon Plant, he observed a bucket of coal being placed into the hopper of the top dryer. (Tr. 264.)

Despite qualifications, both Donald and William Rosini essentially conceded that drying took place at the Carbon Plant. (See Tr. 403 (Donald Rosini described the operation of the rotary dryer); See Tr. 521 (William Rosini stated "we do a number of things . . . mostly drying and we do whatever the customer actually wants.")). Although Respondent's own expert also conceded the Carbon Plant "lowered" or "changed" the moisture contest of coal (Tr. 616, 637), his contentions that such an activity did not constitute drying were found by this Court not to be credible. It is uncontroverted that the Carbon Plant loads stored coal. This Court accepts Respondent's arguments that many facilities – hospitals, schools, steel mills, railroads and shipyards, foundries, private residences – store and load coal and would not reasonably be subject to MSHA. However, the nature of operations at such medical, educational, transportation, and residential facilities, is markedly different from that of the Carbon Plant.

Much of Respondent's case, whether by pleading, testimony, cross-examination, argument or brief, has been directed to establishing that the Carbon Plant also utilizes non-mined materials and engages in manufacturing processes involving chemicals or non-coal carbons. This argument, however, misses the critical jurisdictional point of whether those substantial plant activities that do involve anthracite coal arguably bring the Carbon Plant within MSHA jurisdiction.[15]

[15] This is especially so given, *inter alia*, the Congressional concern as enunciated in section 2 of the Act that "the first priority and concern of all in the coal or other mine industry must be the health and safety of its most precious resource – the miner" and given the clear Congressional mandate and interagency agreement directive for MSHA inclusion.

The record *in toto* clearly establishes that a substantial portion of the material used by Respondent was anthracite coal.[16] The record further clearly reveals that Respondent engaged in activities whose nature and function arguably constituted the work of preparing the coal.

This Court specifically rejects the proposition that a claim of jurisdiction should be solely based upon the amount of coal used.[17] Further, this Court has found no case or statutory law that mandates the exercise of MSHA or OSHA jurisdiction purely based upon the percentage of mined or non-mined materials used or, indeed, based upon the percentage of manufacturing versus mining activities at a facility. However, this Court is persuaded that the extensive use of coal at a facility and the number and volume of coal-related activities would be legitimate factors in determining Mine Act coverage. Further, to the extent that Respondent has suggested that Carbon Plant's operations only involve a *de minimis* use of anthracite coal or *de minimis* involvement of coal-related activities, this Court rejects such as being belied by the record *in toto*.

This Court agrees with Respondent that a "*per se*" analysis should not be utilized in determining jurisdiction, but rather a "functional" analysis. (A functional analysis is one that determines whether the Mine Act covers a facility based upon the nature of the functions at the facility. *RNS Services, Inc. v. FMSHRC*, 115 F.3d 182, 184 (3d Cir. 1977). However, in applying a functional analysis to the subject facility, this Court finds that the Carbon Plant is a custom coal preparation facility that stores, sizes, dries and loads coal to make it suitable for subsequent industrial use.

The Carbon Plant's operation/activities, as argued by the Secretary, closely resemble that of facilities found to be under MSHA jurisdiction. See *inter alia*: *Alexander Bros., Inc.*, 4 FMSHRC 541 (1981) in which the Commission sustained Mine Act coverage over a coal reclamation facility; *Air Products & Chemicals, Inc.*, 15 FMSHRC 2428 (Dec. 1993) *aff'd* 37 F.3d 1487 (3d Cir. 1994) where the Commission found that the Mine Act covered the further preparation of coal refuse at a cogeneration plant before being used as fuel at the plant; *RNS Services*, 115 F.3d 188 (3d Cir. 1994) affirming *Air Products*. This Court further accepts as reasonable the Secretary's view that screening of coal at the Carbon Plant is a form of "sizing." (*See, i.e.,* Tr. 76-77 for Inspector Bierman testimony regarding such; *see also* Bureau of Mines, U.S. Dept. of Interior, A Dictionary of Mining, Mineral and Related Terms, 226, 976, noting that "screening" may be used as a synonym for "sizing.")

As to witness credibility and this Court's duty to assess such, this Court found the Respondent's chief witnesses to have offered contradictory, inconsistent, and suspect testimony. The Court specifically finds that there has been an attempt by the owners to obstruct the amount of coal used by the Carbon Plant, the percentage of coal versus non-mined materials, and the actual nature and extent of its coal versus non-coal operations.

At hearing, Donald Rosini testified that anthracite coal comprised only 20% of the products

[16] The credibility of the Respondent's assertions otherwise will be discussed *infra*.

[17] See Respondent's argument at footnote 9 of its posthearing brief that MSHA implicitly suggests such.

prepared at the Carbon Plant and that 70% of Respondent's products were some form of a coal and non-coal mixture. (Tr. 408.) However, an examination of the Shamokin Product Table (Ex. J-2) reveals that the tonnage of anthracite coal, in terms of actual product sold, was much higher than 20%. For example, over 6,000 tons of Respondent's product, "carb-o-cite," made of 100% anthracite coal, was sold in 2009, as compared to only a few tons of multiple products containing no coal or coal mixtures. On cross-examination, William Rosini expressed surprise regarding the "significantly higher" amounts of coal product versus non-coal product purchased in 2009, asserting such as "atypical." (Tr. 554-556.)

Emails from Respondent to customers also indicate higher percentages of anthracite coal usage than testified to. At hearing, the Secretary also presented a sworn declaration under penalty of perjury from another customer of Respondent, Rocky Rollins, who indicated that the Shamokin 585 product used in 2009 and 2010 was 100% anthracite coal (Ex. G-1) which, again, conflicted with the product mixture indicated by Shamokin in its product table. (Ex. J-2.)[18] Williams Rosini's attempts to explain away this discrepancy were found by this Court to be unpersuasive. (see *inter alia* Tr. 531-535.)

At hearing, Donald Rosini gave equivocal testimony as to his actual knowledge of the Carbon Plant's operations since 2004. At one point he stated that he did not know if there had been any changes in customer base, what customers were demanding, and the ratio of straight coal to blended and non-coal product at the Carbon Plant. (Tr. 411.) He further testified that he had not spoken with his father in detail about the plant's products. (Tr. 424.) On the other hand, he asserted that MSHA had painted a distorted picture of the plant's products/operations. (Tr. 424-425.)

This Court noted that neither inspector Bierman or Farrell observed any mixing of coal with non-coal materials at the plant, such testimony being supported by the plant production reports which William Rosini alleged "surprise" over. The only bid sheets Respondent provided for it sales were for anthracite coal. (Tr. 567-568, Ex. G-5.) The Respondent's emails in anticipation of an MSHA inspection, again, can reasonably be construed as attempts to obfuscate the facility's actual operations.

This Court found William Rosini's descriptions of Respondent's past production manager as a "gofer," whose work primarily involved boosting morale on second shift to be unconvincing. This Court also found the Respondent's expert witness, Lawrence Gazdick, to be an unreliable, uninformed, and uncredible witness.[19] For example, Gazdick opined that the Occupational Safety and Health Act was better able to ensure the safety of Carbon Plant's employees than the Mine Act.

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[18] This hearsay statement standing alone would be assigned little weight by this Court. But, when considered in the context of the other evidence of record, discussed *intra*, indicating attempts by Respondent to conceal the true nature of its operations, said statement supported this Court's findings of lack of Respondent's credibility.

[19] Although this Court did deny the Secretary's motion to exclude the expert witness testimony of Mr. Gazdick, this Court did find some merit in the Secretary's argument that Gazdick's testimony should be barred to the extent he sought to opine on the ultimate issue of jurisdiction. (*See also* Secretary's Motion in Limine to Exclude Expert Witness Testimony.)

However, on cross-examination, Gazdick conceded he did not know what OSHA guidelines and training were. (Tr. 638-639.)

Contrary to Respondent's arguments, the Carbon Plant's operation meets the definition of work of preparing the coal – a process usually performed by coal preparation facilities to make coal suitable for a particular use or to meet market specifications. *Oliver M. Elam, Jr., Company*, 4 FMSHRC 5, 8 (Jan. 1982). This Court essentially agrees with the rationale of the Government contained in exhibit G-7 that Carbon Plant is a surface facility processing coal to customer's specifications and for particular uses which meet the functional requirement of section 3(i) and the Elam analysis. *See also* Commission's statement at 4 FMSHRC 5, 7 (1982): "[A]s used in section 3(h) and as defined in section 3(i), "work of preparing coal" connotes **a process**, usually performed by the mine operator engaged in the extraction of the coal or by **custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications**. [emphasis supplied]"

This Court further accepts the Secretary's position that the activities at the Carbon Plant can properly and reasonably be interpreted as "milling" pursuant to Interagency Agreement provisions and pertinent case law. see *In re Kaiser Aluminum and Chemical Co.*, 214 F.3d 586, 591 (5th Cir. 2000) (Congress expressly delegates to the Secretary . . . authority to determine what constitutes mineral milling). Indeed to the extent that there is any ambiguity or silence in the Mine Act and MOU terms discussed *intra*, this Court has found the Secretary's interpretation to be permissibly reasonably ones.[20]

The Respondent garnered testimony at hearing stating that the storing, drying, screening, and loading coal can all individually be considered incidental to process being performed and, thus, fall outside the purview of MSHA. While this may be true, these processes cannot be viewed in isolation of one another. *Mineral Coal Sales, Inc.*, 7 FMSHRC at 620. "In examining the 'nature of the operation' performing work activities listed in Section 3(i), the operations taking place at a

[20] The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc*., 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co*., 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "Chevron II" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. Chevron, 467 U.S. at 843; *Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997).

single site must be viewed as a collective whole." *Id*. at 620-21. When viewed collectively, the Respondent is storing large amounts of coal, screening it to remove impurities and ensure size quality, drying it, and loading it in bags appropriately sized to be sold in the stream of commerce. The fact that it is customizing the formulas to meet industry and customer specifications only strengthens the Secretary's position that the Respondent is operating a custom coal preparation facility and should, therefore, continue to be covered under MSHA's jurisdiction.

ORDER

Having found that Shamokin Filler Company is under the jurisdiction of the Mine Safety and Health Administration, it is **ORDERED** that the Respondent resume discussions with the Secretary concerning the underlying citations in this case.

John Kent Lewis
Administrative Law Judge

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